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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 715

IN THE MATTER

of

The Petition of REDERI A/S HENNESEID, as Owner of the Motor Vessel "AAKRE," in a cause of exoneration from or limitation of liability.

CHARLES I. WATERMAN, *et al.*,
Petitioners,

v.

Steamship "AAKRE," REDERI A/S HENNESEID, LAMPORT & HOLT LINE, LTD., and CONTINENTAL GRAIN COMPANY,
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

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TABLE OF CONTENTS

PAGES

The briefs filed by the respondents are not directed to the issue raised by the petition 1

That the rule of *The Pennsylvania* applies in the present case is established by the decisions of this Court 3

The respondents go outside the findings of the lower courts and argue the case on the evidence 4

Importance of the case 7

TABLE OF CASES CITED

Denali, The, 105 F. (2d) 413 3

Denali, The, 112 F. (2d) 952 3

Lie v. *San Francisco and Portland S. S. Co.*, 243 U. S. 291 3

Pennsylvania, The (19 Wall. U. S. 125) 1, 3, 4

Richelieu & Ontario Nav. Co. v. *Boston Insurance Co.*, 136 U. S. 408 4

OTHER AUTHORITY CITED

Canadian Statute 4

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REPLY BRIEF ON BEHALF OF PETITIONERS

The briefs filed by the respondents are not directed to the issue raised by the petition.

The respondents make no attempt to suppport the statement of the Circuit Court of Appeals that the rule of *The Pennsylvania* (19 Wall. U. S. 125, 136)—

> "has done no more than shift the burden of proof with regard to causality" (R. 1450).

The only one of the respondents who refers specifically to this statement (which is one of the principal grounds of our petition) dismisses it with the extraordinary assertion that "*it has not been questioned by the petitioners*" (Lamport & Holt brief, p. 12).

The respondents argue that the case presents concurrent findings of fact which this Court will not disturb; but the so-called finding of fact is merely the acceptance of the master's testimony that the data which he had was sufficient, although he made no use of it and, admittedly, it did not satisfy the requirements either of the statute or of good seamanship (see passages from opinion below quoted on p. 23 of our principal brief). This finding presents a clear-cut question of law, *i. e.*, whether *The Pennsylvania* rule still stands in its original form, or whether it has been so reduced by later authority that it can now be met by a mere balance of probability, or by proof that compliance with the statute is unnecessary. Is it still necessary to prove that the violation of a statute "could not" have contributed to the disaster; or is it now sufficient to show that it "probably did not"?

The respondents wholly ignore the specific finding below that one of the factors which set the "Aakre" over to westward, where she went aground, was the failure of her navigators to allow for a material deviation of her compass (see our principal brief, pp. 22, 26, 27). In connection with this finding, the case presents two clear-cut questions of law:

(a) Can this contributing cause of the stranding be disregarded because other errors of navigation would probably have caused the stranding in any event? The lower courts found that it could be so disregarded.

(b) In view of the admitted fact that the navigators of the "Aakre" did not consult their compass book, at a time when they were seriously concerned about their position, and did not make even the allowance for deviation called for by the meager and incomplete data in that book, can anyone properly say, as was said in the lower Court, that—

> "even a fairly general deficiency in the records could not have been material to the stranding?"

This is a finding that because a navigator did not rely on an incomplete record, it necessarily follows that he would not have relied on a complete record.

Neither of these findings can be sustained under *The Pennsylvania* rule as laid down by this Court. Indeed, the Court below tacitly recognized that this was so, because the majority of the court took pains to say that *The Pennsylvania* rule as now enforced did no more than to shift the burden of proof. Judge FRANK was unable to accept this modification of the rule and criticized the majority opinion on that ground. He was of opinion that this rule placed upon a violator of a statutory mandate a much heavier duty, viz., that of showing that his violation of the statutory mandate *could not* have been the cause of the loss. The Circuit Court of Appeals in *The Denali*, 105 F. (2d) 413; affirmed on rehearing 112 F. (2d) 952, took the same view. The argument by respondents that the authority of *The Pennsylvania* is fully recognized in the Second Circuit, and that the present case involves only issues of fact, ignores the actual grounds of the decision below and merely tends to obscure the real issues presented to this Court.

That the rule of The Pennsylvania applies in the present case is established by the decisions of this Court.

This case, like the case of *Lie* v. *San Francisco and Portland S. S. Co.*, 243 U. S. 291, involves the navigation of a Norwegian vessel on the high seas. In the *Lie* case the rule which was violated had been adopted by statute both in the United States and in Norway (243 U. S. at p. 297). As a United States statute could have no application on the high seas, it seems clear that the Norwegian vessel was condemned under her own law, supplemented by the rules of evidence as applied in the United States courts.

The *Lie* case also answers the argument made by the respondent Continental Grain Company (at page 8 of its brief), that the Norwegian statute involved in this case is "directed to the officers and engineers of the ship and not to the vessel or owner." It would be difficult to think of any regulation which was directed more specifically to the officers of the vessel than the steering and sailing rules which were involved in the *Lie* case.

Respondents suggest that the navigation of the "Aakre" was governed by Canadian law. It is true that the form of the contract of affreightment was governed by Canadian law;* but just why the navigation of a Norwegian vessel on the high seas should be governed by Canadian law is not apparent to us. Even if this point be conceded, however, it makes no difference in the result. In the case of the *Richelieu & Ontario Nav. Co.* v. *Boston Insurance Co.*, 136 U. S. 408, the vessel was governed by Canadian law; but the presumption of fault was not, as suggested by the respondents, based on the Canadian statute. The Canadian statute provided:

> "In case any damage to person or property *arises from* the non-observance by any vessel or raft of any of the rules prescribed by this act, such damage shall be deemed to have been occasioned by the wilful default of the person in charge * * *" etc. 136 U. S. at page 422. (Italics ours.)

It is apparent that this provision does not apply until the question of causation has been decided; and it was in deciding this question that this Court cited and relied upon *The Pennsylvania.* See 136 U. S. at page 422.

The respondents go outside the findings of the lower courts and argue the case on the evidence.

Our petition is based solely on the findings of the lower courts and we have been careful not to discuss any issues of fact. We cannot, however, ignore some of the statements made by the respondents in their discussion of the evidence.

In their eagerness to show that this case turns on questions of fact, the respondents devote a considerable part of their argument to questions about which there has been no controversy since the evidence was closed. An example of this is the good mechanical condition of the compasses,

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* As pointed out in our principal brief (p. 19) the Canadian law on this subject is the same as our law.

which these petitioners have not questioned since the evidence on the subject was offered in the District Court. Petitioners' contention is not that the compasses themselves were in bad condition, but that the navigators did not have the necessary data to enable them to use the compasses accurately—*i. e.*, to show the extent of their deviation.

The respondents show a natural reluctance to discuss the actual findings below with respect to the deviation of the compass. Those findings were that, on the course on which she left St. John, the "Aakre's" compass had an easterly deviation of some 3°; that this deviation was material in amount and was a factor in setting the vessel to the westward where she went aground; but that this deviation can be disregarded because of other errors in navigation which, the court finds, would have put her aground in any event. Respondents ignore these findings and attempt to support the decision below on grounds different from and inconsistent with those adopted by the lower courts.

On the page of the compass book devoted to the point (Southwest) nearest the "Aakre's" course, there was only one entry within a year; but the lower courts held that this entry, showing a 3° easterly deviation, should have given the master sufficient information. The respondent Lamport & Holt, however, argues that this entry did not in fact show the true deviation of the compass on the course to which it related; but that a study of all the deviation data available, including the log-book entries, would have indicated that the deviation was less than 1° (Lamport & Holt brief, pp. 15, 16). If this argument is accepted it merely confirms that there was not available to the master, in condensed and convenient form, any reliable data as to the deviation of his compasses.

The same brief stresses the fact that the entries in the log-books show very few deviations in excess of three or four degrees. To appreciate the significance of these figures it is necessary to bear in mind that even where the deviations do not exceed 3° they range between 3° minus

and 3° plus—a range of 6°, or more than half a point. The argument that these deviations are of no significance must be considered in connection with the finding by the Circuit Court of Appeals (quoted on page 23 of our principal brief) that "all the expert witnesses and the court itself seemed to agree" that good practice requires any change of as much as one degree in the deviation to be entered in the compass book.

The argument that the *average* deviation was very small is particularly misleading. If there were a deviation of 3° plus yesterday and 3° minus today, the average deviation would be zero; but no one would argue that a shift of 6° in the deviation was unimportant.

The shipowner argues that the compass was of no consequence because the captain did not intend to rely upon it anyway, but intended to navigate by radio bearings. Even when accurate, however, radio bearings merely enable a vessel to fix her position at any given time; they do not guide her from that position to another. A vessel can only set a course by her compass; and if the deviation of the compass is not accurately known she cannot lay an accurate course.

The District Court found the place of stranding was more than 44 miles from the departure buoy outside St. John Harbor (R. 1395); and that the drift of the "Aakre" during the period of some three hours while her engines were stopped was only 5 miles (R. 1399). It is obvious, therefore, that all but a very small percentage of the "Aakre's" progress from her point of departure to the point of stranding was brought about by her own motive power, propelling her along courses laid necessarily by her own compasses. The "Aakre" never obtained a radio cross-bearing until about half an hour before the stranding (opinion of District Court, R. 1391). In fact, the District Court criticizes the "Aakre's" navigators for not having obtained such a cross-bearing earlier (R. 1389-1390), although the only evidence on the point (given by

the ship's own radio operator) is that no such cross-bearing was then obtainable (R. 402, 403).

The foregoing facts show the complete fallacy of the argument that the "Aakre" was navigating by some strange method that did not involve the use of her compass. We have been forced to refer to the evidence because the respondents have chosen to argue the case on questions of fact instead of meeting the clear-cut issues of law presented by the petition.

Importance of the case.

The Continental Grain Company (p. 11 of its brief) argues that this case is not important because—

> "A case involving similar facts would rarely happen again."

and because—

> "No loss of life is involved."

As to the first reason: the present case is important not because of its particular facts, but because of the question of principle involved,—*i. e.*, whether a statutory mandate concerning safety of navigation may be ignored, and a shipowner may be excused for such conduct merely upon the ground that the master of the vessel substituted an entirely different method of avoiding marine disasters in place of that provided by the statute.

As to the second reason: surely it is unnecessary that lives should actually be lost in order to emphasize the importance of the precautions by which they might have been saved.

Dated, New York, December 1, 1941.

Respectfully submitted,

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